No. 2511

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAS. F. FINDLAY, T. CLIVE DAVIES and W. H. BAIRD,

Plaintiffs in Error.

v.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

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The attorney for the defendant in error raises the point that there were no special findings, but does not seem to have much confidence in the same as he then proceeds to a full discussion of the evidence, which would be wholly unnecessary if his contention were tenable. It was understood by the parties and the court that it would make its findings in and by its decision, which it did very fully, and that decision, is part of the record. Certainly the court and all parties thought that special findings were

made. In the begininng of the court's findings or decision, the following statement appears: "From the evidence, the *facts* appear as hereinafter set forth,,. Again (p. 50) the court apologizes for reviewing so elaborately the whole transaction but stated it deemed it advisable "in order to make the reason for my conclusions fully understood". Conclusions can mean nothing other than inferences drawn from the subordinate or evidentiary facts reviewed.

Again the court speaks of its findings (p. 37). See also page 38 where the statement is made, "if the master, as I *find*, actually regarded the proceedings covered by the bond, etc." The motion for rehearing also sets out certain findings of the court as grounds for rehearing and the court reiterated its findings by over-ruling the motion. We do not think that the technicality now raised, violative, as it is, of the understanding on which the case was tried, will prevail. As it has been raised, however, we feel free in this reply brief to go more fully into the questions of evidence raised by the bill of exceptions which questions were not fully discussed before because we believed our attack on the findings to be invulnerable.

The Brief of counsel for defendant in error requires little comment as it is substantially a repetition of the court's decision, the argument of which we think was fairly met in our former brief. In arguing on the validity of the bond, the counsel for defendant in error lays great emphasis upon the fact that the power given to the secretary by Section 5294 R. S. to remit fines and penalties may be exercised prior to trial as well as after and that if "plaintiff in error applied for a remission of penal-

ties * * * * * a necessary implied power existed to take a bond to indemnify against loss that would follow a failure to seize and libel the vessel." As the whole case of defendant in error rests upon the implied power of the officials to take, not *a bond* to indemnify against loss, but *the* bond in question, it will be well to again review the elementary propositions of the law of agency. Counsel for defendant in error does not contend that there is an express authority in the collector of Customs or the secretary of Commerce and Labor to exact the bond in question or any bonds, but that such authority is "necessary" and therefore is implied. No such authority can be called necessary, as the doing of the authorized act to-wit: remitting fines or penalties, clearly does not require that a bond of any kind be given. The most that can be said for an implied power to exact a bond is not that such power is necessary but that it is convenient, customary or is a proper incident of the express authority. (See page 25 of our former brief). To repeat a statement in our former brief, even though for the sake of argument, it might be admitted that power to take a bond to indemnify against the loss that would follow a failure to seize and libel a vessel, is implied, yet it is a far different proposition to say that the secretary has implied power to exact a bond that will give himself the power and right to determine the question of liability and the extent thereof, a bond that will deprive an accused of his day in court and will oust the courts of jurisdiction to pass upon the question of the guilt or innocence of the accused and the nature or extent of his punishment. We may grant for the sake of argument that either before or after a vessel has been seized, it may be released upon giving a bond conditioned upon the

payment, not of such penalties as an executive officer may inflict or decide have been incurred, but of such fines as a court may impose. The president has full power of pardon and may pardon before or after conviction regardless of whether the punishment be fine or imprisonment, yet would any one argue that the president has an implied power to require a bond from an accused person conditioned to pay such penalties or undergo such punishment as the president should determine and that such a bond could be enforced regardless of the guilt or innocence of the accused, or that application for a pardon is a conditional admission of guilt. Again, when an individual stands accused of crime, he may be released upon a bond but not a bond conditioned upon the payment of such fine as an executive officer may determine. Is it a necessary, customary or proper incident of the secretary's power to remit penalties under Section 5294, of the Revised Statutes, that he have a power to exact from an applicant—(though we do not admit that the plaintiff in error in this case was an applicant for the remission of penalties)—a bond to secure the payment of such fines as the executive officer may impose?

The argument that the bond in question was not one to submit the question of whether a penalty had been incurred to the determination of the secretary of Commerce and Labor, but was an obligation to secure admitted penalties was fully covered in our former brief but we may add that the legal effect and interpretation of this document is a question of law so that the lower court's findings are entitled to no more weight than a decision upon a point of law. See *U. S. Trust Company v. Merchants Trust Co.*,

88 Fed. 140. We may repeat also that all the so-called evidence shows conclusively that the secretary was to determine whether any penalties had been incurred. As pointed out, the declaration is framed on this theory; the District Attorney, who drafted and approved the bond, argued that it was good as an arbitration (see p. 34 of the record); the collector of Customs thought it was his duty to impose and collect the fines (see his letter, "Exhibit 10") and the bond in his mind clearly was submitting the question of liability to the secretary of Commerce and Labor for arbitration; the report of the Grand Jury, which was made at the request of the Collector of Customs, states that it was made for the purpose of aiding the authorities at Washington in determining what, if any, penalties should be inflicted. The case was tried on the theory of law that was argued by the District Attorney and it was not until the court, after several months of labor, suggested the theory of a request for remission of admitted penalties, that the idea occurred to any of the executive officers who are now supposed to have intended and had this idea in mind from the beginning.

Leaving out of consideration the fact that the evidence does not in truth show a different intent from the wording of the bond, counsel's argument that a construction given by the parties is entitled to great weight overlooks the fact that to be admissible such interpretation or construction must be one adopted by both parties or adopted by one and acquiesced in by the other. How can the plaintiff in error be said to have acquiesced in the opinions expressed in the letter of Canavarro, the report of the Grand Jury, the letters of the Collector

of Customs and letters of the District Attorney when there is no evidence that the existence of such documents was ever known to him. All the authorities hold that the construction by one party to a contract not communicated to the other is not admissible when the effect of the contract is in controversy.

Taft. V. Dickinson, 6 Allen (Mass) 553.
Richardson v. Hartford, 149 N. Y. 307.
Bay State v. Dougger, 214 Mass. 166.

Again where parole evidence may be used it must be otherwise admissible, in other words must not be hearsay or opinion evidence unless of course it comes within some of the established exceptions.

Let us briefly examine the evidence submitted on the standpoint of admissibility aside from the objection that this evidence violates the rule against varying a written instrument by parole. For example admitting the letter from A de Souza Canavarro (exception No. 5 Error V.) addressed to Governor Frear, which letter discussed the deaths among the children of the immigrants on board the "Orteric" and the lack of sanitary precautions on this vessel, violated all the rules of evidence inasmuch as the letter is hearsay, was not made under oath, represents merely the opinion of the declarant concerning matters about which he had no personal knowledge or information other than hearsay. How can such a letter come within any of the hearsay exceptions or be used for any purpose, especially when it was not brought home to the plaintiff in error, Findlay, in any way. Again, the letters from the collector of Customs to the District Attorney cannot be regarded as binding on the defendant be-

low in any way. The extract from the report of the Grand Jury, which report was made at the suggestion of the District Attorney and the collector of Customs, was never brought home or called to the attention of the Master of the vessel and cannot be otherwise regarded than as rank hearsay. Again the letter of the collector of Customs (Exhibit 9) to the Secretary of Commerce and Labor enclosing the various letters representing the opinion of the Grand Jury, the Portuguese Consul, the District Attorney, etc., admitted over the objection of the plaintiffs in error was not in any way binding on the plaintiffs and did not tend in any way to interpret the bond in question.

Remembering that this evidence is what influenced the court in repudiating the language of the bond (see p. 28) it needs no argument to show that it was highly prejudicial to plaintiffs in error and should be grounds for reversal. It is evident that the opinion expressed in these letters and in this report of the Grand Jury so prejudiced the court that it was determined to hold the plaintiffs in error at all costs. In fact both the Secretary of Commerce and Labor and the trial judge quote at length from the report of the Grand Jury in condemning the master of the "Orteric."

The motion in arrest of judgment should have been granted. Counsel for defendant in error attempts to dispose of this question by stating that if the bond can be considered as a bond to pay admitted penalties, the complaint states a cause of action. The error in such argument is apparent. Motion in arrest of judgment goes to the sufficiency of the complaint and the evidence cannot be considered in granting or refusing a motion. *Bond v.*

Dustin 112 U. S. 604. The court below and counsel in his brief admitted that there is no authority "to pass up to the secretary of Commerce and Labor a determination of whether or not a penalty had been actually incurred." Let us examine the complaint along the lines of this admission and see whether it states a cause of action. The complaint recites the execution of the bond, the said bond being subject to a condition that if the principal shall pay to the United States of America, through the Collector of Customs at the port of Honolulu, "the amount which the department of Commerce and Labor of the United States shall upon such presentation of facts determine that the said principal is liable for on account of such penalties so alleged to have been incurred" the obligation shall be void. The complaint then states that the department of Commerce and Labor of the United States, through the secretary thereof, "*did determine* that the said James F. Findlay was liable to the United States of America for and account of certain penalties alleged to have been incurred by him as master of the British ship, "Orteric" on account of the alleged violations of the laws of the United States of America designated as the Passenger Act of 1882 as amended; and did on the 4th day of September, A.D. 1911, determine that the said liability on account of said violation did amount to the sum of $7,960.00; that notice of the determination so made was given to the defendants and demand made for payment. The complaint concludes with the prayer for judgment for $7,960.00 with interest thereon from the said 4th day of December. Note that the complaint demands interest from the 4th day of December, the date of the determination of the penalties by the

secretary. It is useless to repeat the discussion on pages 34 and 35 of our original brief. Certainly if the contention of defendant in error that the evidence proves that the bond was intended as one to pay admitted penalties there is a variance between the declaration and the proof.

ESTOPPEL.

In our opening brief the question of estoppel is discussed, and we submit that the brief on behalf of the Government in no way meets the reasoning there presented.

The authorities referred to in the Government's brief all show the necessity for the elements of false representations of fact, the purpose of inducing the party seeking the estoppel to act, the falsity of the representations, the falsity of which is unknown to the party induced to act, and finally action by the party seeking the estoppel upon the representations to his own detriment. (See our opening brief pp. 35-36).

No misrepresentations of fact appear in the record. No purpose to induce the Government to act such as is required appears. There being no misrepresentations of fact, the Government cannot claim that it was misled. Likewise, for the same reason, the Government cannot be said to have acted to its detriment upon any such misrepresentations.

The only thing that can be said is that the master of the vessel was willing to, and did, give the bond in question to the Government, and that the Government was willing to, and did, accept the bond, and accordingly took no steps to seize the vessel or proceed against the master. We submit that the Government was quite as competent to judge of the

validity of the bond accepted by it as the master, and it cannot now claim that the bond, invalid as it is, is validated because its representatives failed to secure a proper bond. In other words, the representatives of the Government *exacted* an illegal and invalid bond, and it would be ridiculous to hold that having so done, the Government can now preclude the parties from showing that illegality and invalidity. Otherwise no bond whatever taken by the Government, however obviously invalid or defective, could ever be contested.

We submit that the Government occupies no better position than an individual party in a case such as this. If, instead of the Government, an individual had been the party claiming under the bond in question, we do not believe the argument of estoppel would even have been suggested.

What is it that the plaintiffs in error are estopped to deny? It can only be claimed that they are estopped to deny a matter which is purely and simply a question of law, the legality or illegality of the bond. The bond when accepted by the Government, spoke for itself, as it speaks for itself now. If it was an invalid bond when offered, when accepted, and when acted upon, it is an invalid bond now.

CONCLUSION.

In the concluding remarks of counsel for the Government in his brief, an appeal is directed to the courts on the ground of convenience. Such an argument merits no reply. We simply refer the court to the quotation from *Sherlock vs. United States*, 43 Ct. of Cl. 161, on page 28 of our opening brief, which amply disposes of this argument.

To summarize, the decision of the court is clearly a special finding of facts. However, whatever may be the conclusion reached by the court on that point, the whole question of the liability of the plaintiffs in error is open to review by this court, on the question raised by the motion in arrest of judgment. If the complaint, which sets forth the bond in full, does not set forth a cause of action, it could not be remedied by any evidence that could be taken, and consequently irrespective of the judgment of the trial court, a reversal should follow. Again pure questions of law are raised by the exceptions to the admission of the evidence upon which the trial court relied in arriving at its conclusion, and we have we submit, demonstrated the errors committed in allowing this evidence, and again for that reason a reversal should follow. The only affirmative point raised by the Government, is that of estoppel, and we feel secure in our position that none of the elements of estoppel are to be found in this case.

We therefore submit that the judgment below should be reversed.

Respectfully submitted,

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